

CONGRESS CONTINUES TO ACT LIKE A RUMP APPENDAGE ON WAR

Back when President Obama introduced his version of the AUMF (which didn't sunset the 2001 AUMF and didn't include meaningful limits on the ISIL war), I suggested he was leveraging the competing interests of Congress to retain maximal Executive powers.

Those who seek to limit Executive authority would be nuts to pass such an authorization.

Indeed, there are already signs of dissent from Democrats. "[W]e must [pass an authorization] in a way that avoids repeating the missteps of the past, and that does not result in an open-ended authorization that becomes legal justification for future actions against unknown enemies, in unknown places, at unknown times," Senator Pat Leahy reacted, recalling how the 2001 AUMF had been used to authorized indefinite detention and drone strikes far from the battlefield.

That may be part of the point. Republicans have already objected to the one biggest limit in the AUMF, its promise not to use "enduring" ground troops, which hardliners think are needed. "If we're going to authorize use of military force, the president should have all the tools necessary to win the fight that we're in," John Boehner told the National Journal and other reporters.

Which may mean such a bill will not pass Congress. Even as Republicans are squealing about what they claim is a presidential power grab on immigration, they appear content with this particular

power grab – particularly if the President will bear responsibility for any big reverses in this war.

If this AUMF doesn't pass, President Obama will continue to rely on fairly audacious claims about other sources of war authorization, all the while claiming Congress is responsible for not authorizing what he's doing. If this AUMF does pass, President Obama may continue relying on a hodgepodge of AUMFs, thereby claiming fairly unlimited boundaries to his war powers.

Heads or tails, we're likely to still end up with claims to fairly unlimited Presidential authority to wage war.

Ben Wittes, in response to The Hill declaring the AUMF dead, offers similar analysis in retrospect.

We see in this story why Obama was clever to play the AUMF debate the way he did, following the Syria AUMF debacle in 2013. Obama, recall, declared that he didn't need a new AUMF, waited months to send up a draft, and then sent up a draft that contained authorities duplicative of those he already claimed. This wasn't principled or good government, in any sense, but the result is that Obama has successfully turned congressional calcification and paralysis to his advantage.

The reason is that because of the way he postured the matter, nothing actually hinges for Obama on congressional passage of a new AUMF; the President, after all, claims the authority to do everything he wants to do against ISIL under current authorities. In fact, as I explained the other day, congressional failure to act arguably constitutes acquiescence to his broad claim of

authority under the 2001 AUMF, since few of the members of Congress who are refusing to pass a new authorization are also claiming that the president lacks legal authority to take action. Many Republicans are actually complaining that he is not doing more than he is against ISIL.

Obama, in other words, put himself in a position in which congressional action would strengthen his hands and congressional inaction—always the likeliest outcome these days—would also strengthen his hand, or at least not weaken it.

It was a smart play on the part of White House lawyers.

I'd be hooting "I told you so" if the implications weren't so dire.

Obama claims these AUMFs authorize not just bombing in Iraq and maybe Syria and who knows why not Libya and while we're at it everyone's having fun bombing the shit out of Yemen these days. But they authorize a claim to breathtakingly expansive authority for the President.

Fourteen years later, you might think Congress would start to get jealous of its own authority and begin reclaiming it. And, in fact, Republicans *are* squawking about limited Executive power grabs elsewhere.

But not on war. Never on war.

Remember when this war began because "They hate us for our freedoms," which in part included real limits to Executive authority?